No. 83-1964

In the Supreme Court of the United States

OCTOBER TERM, 1984

LEONARD BEDNAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish the materiality of petitioner's false testimony.
2. Whether the false document prepared by petitioner was a document required to be maintained under SEC regulations.
3. Whether petitioner's grand jury testimony should have been suppressed because he was not given *Miranda* warnings prior to testifying.
4. Whether the indictment should have been dismissed because the grand jury was improperly influenced by testimony of an FBI case agent.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 728 F.2d 1043.

JURISDICTION

The judgment of the court of appeals (Pet. App. A11) was entered on February 24, 1984. A petition for rehearing was denied on April 2, 1984 (Pet. App. A10). The petition for a writ of certiorari was filed on June 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri,

petitioner was convicted on three counts of perjury before a grand jury, in violation of 18 U.S.C. 1623, and on one count of making a false entry in records required to be kept under Securities and Exchange Commission regulations, in violation of 15 U.S.C. 78q(a)(1) and 78ff. Petitioner was sentenced to four concurrent five-year terms of imprisonment and was fined $1,000 on each of the four counts.

1. The evidence at trial (see Pet. App. A2-A4) showed that petitioner was a vice president and secretary of Stix & Co., a broker-dealer in securities registered with the SEC and doing business in St. Louis, Missouri. From 1976 to 1980 he was the chief of operations for the firm (II Tr. 132). As chief of operations, he was the immediate supervisor of Thomas Brimberry, a senior vice-president. Petitioner also bore personal responsibility for maintaining various margin accounts, *i.e.*, accounts through which clients could borrow against securities held in their name. In November 1981, Brimberry revealed that he and others in the firm had manipulated ten margin accounts by falsely representing that they contained securities that could be used as collateral for substantial loans. The SEC enjoined further operations by Stix & Co. and discovered that over $34 million in securities were missing. The total loss to the investing public eventually amounted to $14 million.

In February 1982, a federal grand jury was convened to investigate the embezzlement. Petitioner, who had not been implicated by Brimberry, was one of the first witnesses to testify. Petitioner denied any personal involvement in three specific aspects of the cover-up of the embezzlement conspiracy—the failure to file tax forms pertaining to the margin

accounts; the deletion of dividend entries for those accounts; and the backdating of a new account card for the J. A. Miller margin account. The tax forms (IRS Form 1087) would have alerted the Internal Revenue Service to the existence of taxable income supposedly generated from the margin accounts. The conspirators feared that filing the forms would prompt an IRS audit, which in turn would uncover the embezzlement scheme. Petitioner testified before the grand jury that he always mailed the forms to the IRS, and he denied having told Brimberry not to mail the 1980 tax year forms. In fact, petitioner had not mailed the forms for the 1979 tax year and, in a conversation witnessed by a Stix employee, had told Brimberry not to mail the forms for the 1980 tax year.

On the face of company records it appeared that the non-existent securities in the margin accounts were generating dividends. Petitioner testified before the grand jury that he told Alice Eads, a Stix employee, merely to follow Brimberry's instructions concerning the apparent dividends. In fact, petitioner and Brimberry instructed Eads to delete any record of dividends from the firm's computer and to throw away the back-up documentation if the underlying security could not be found on the firm's premises.

Petitioner also testified before the grand jury that he prepared the new account card for the J.A. Miller margin account (one of the bogus margin accounts used by the embezzlers) in 1977 when he sat down with Brimberry and took down data on Miller's background. A Stix employee testified that petitioner had filled out the J.A. Miller card in 1981, following an SEC examiner's request to see the card, and had done so without consulting Brimberry.

These three denials formed the basis for petitioner's perjury convictions. Petitioner's false entry conviction was based on his backdating of the new account card for the fraudulent J.A. Miller margin account.

2. The court of appeals affirmed petitioner's convictions (Pet. App. A1-A9). The court held that the government had met its burden of proving that petitioner's false statements were material to matters considered by the grand jury. The court of appeals also concluded that the trial court did not err in admitting expert testimony by an SEC official that a new account card is a document required by SEC regulations, that the evidence was sufficient to show that the card in fact was required by SEC regulations, and that the jury instruction on this issue was proper. The court held further that government agents were not required to give petitioner *Miranda* warnings before his grand jury testimony; that the indictment of petitioner was not obtained by improper influence on the grand jury; and that the trial court did not abuse its discretion in limiting closing arguments to 20 minutes per side.

ARGUMENT

1. Petitioner contends (Pet. 7-11) that the government failed to establish that his false declarations were material to the investigation being conducted by the grand jury. The court of appeals properly rejected this contention.

Petitioner does not dispute that his testimony before the grand jury was false. Nor does he deny that his false statements tended to impede the grand jury investigation, and were therefore material, if the government has correctly described the scope of the

investigation.[1] See *United States* v. *Ostertag*, 671 F.2d 262, 264 (8th Cir. 1982); *United States* v. *Brown*, 666 F.2d 1196, 1200 (8th Cir. 1981), cert. denied, 457 U.S. 1108 (1982); *United States* v. *Thompson*, 637 F.2d 267, 268 (5th Cir. 1981). Petitioner contends, however, that the government's proof of materiality was qualitatively insufficient. He relies primarily on *United States* v. *Cosby*, 601 F.2d 754 (5th Cir. 1979), in which the court held that testimony of a grand jury witness and an FBI investigator concerning what they believed to be the scope of the grand jury investigation in that case could not be used to prove what the grand jury was actually investigating.

Petitioner's suggestion of a conflict between *Cosby* and the decision below is without basis. In *Cosby* there was no direct evidence of what the grand jury was investigating, but only the opinion testimony of two individuals who did not have actual knowledge about the scope of the inquiry.[2] The *Cosby* court

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[1] The government introduced evidence to show that the grand jury was attempting to determine how $14 million had been stolen from Stix & Co. through manipulation of margin accounts, where the missing money had gone, who was involved in the scheme, why the books and records of Stix & Co. showed false information for a five-year period, and why the scheme went undetected for a long period of time. The court of appeals correctly concluded (Pet. App. A6) that petitioner's false testimony was material because it impeded the grand jury's inquiry into whether petitioner was actively involved in the scheme, whether he merely aided in the cover-up, and, if he was not involved, why the scheme went undetected for so long.

[2] The grand jury foreman also testified in *Cosby*, but his testimony was limited to a statement that the defendant had appeared and testified under oath before the grand jury. *United States* v. *Cosby*, 601 F.2d at 757 n.4.

noted specifically that in that case the government had not offered either a transcript of the grand jury proceedings or the testimony of the foreman or some other member of the grand jury. 601 F.2d at 757. Here, in contrast, the deputy foreman of the grand jury testified concerning the nature and scope of the grand jury investigation (II Tr. 188-194).[3] In addition, the government provided the district court with the transcript of the FBI case agent's grand jury testimony, as well as the transcript of petitioner's grand jury testimony. The agent's testimony summarized the evidence given by other grand jury witnesses, which contradicted petitioner's sworn testimony.[4] Both the deputy foreman's trial testimony and the transcripts of the grand jury testimony al-

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[3] Petitioner seeks to discount the significance of the deputy foreman's testimony (Pet. 8). But that testimony must be viewed in the light most favorable to the government. See *Burks* v. *United States*, 437 U.S. 1, 17 (1978). The deputy foreman testified expressly that the grand jury was investigating possible violations of the securities and mail fraud laws in connection with the Stix & Co. case (II Tr. 189); that it was looking into why the Stix books showed that the bogus margin accounts were in proper order (*id.* at 190); that it was investigating the fact that IRS forms had not been sent to the IRS in certain years (*ibid.*); and that it was looking into the circumstances surrounding the filling out of the J.A. Miller new account card (*id.* at 191, 193). That testimony was clearly sufficient to allow the trial court to conclude that petitioner's false responses were material to the grand jury's investigation.

[4] In contrast, in *Cosby* the FBI investigator apparently did not himself testify before the grand jury or examine any of the grand jury testimony, but merely conducted his own investigation. There was no indication that the grand jury had advised the investigator of the scope of its inquiry or directed his investigative activities. 601 F.2d at 758.

lowed the court to determine the nature of the grand jury's investigation and, in turn, to conclude that petitioner's false testimony was material to that investigation. The evidence presented to the court in this case was more than sufficient to establish the relationship between "what the grand jury was investigating, and * * * what testimony [petitioner] gave." *United States* v. *Armilio*, 705 F.2d 939, 941 (8th Cir.), cert. denied, No. 83-55 (Oct. 11, 1983).[5]

2. Petitioner next contends (Pet. 11-14) that the new account card he completed and backdated was not a record that Stix & Co. was required to keep under SEC regulations; that expert testimony on this subject should have been excluded; and that the jury charge on this issue was prejudicial. These contentions lack merit.

Under SEC regulations a broker-dealer must keep certain records of its operations, including a record of the name and address of the beneficial owner of any margin account and the owner's signature. 17 C.F.R. 240.17a-3(a)(9).[6] An SEC official testified at trial that the new account card was in fact a record required to be maintained under SEC regulations, that such cards are used by SEC compliance examiners to determine whether broker-dealers are

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[5] Petitioner's related suggestion (Pet. 10-11) that the FBI case agent's grand jury testimony should have been excluded as hearsay is frivolous. The transcript of the agent's testimony was introduced as evidence of what transpired before the grand jury, not to establish the truth of the matters about which he testified.

[6] Petitioner contends (Pet. 12) that the new account card is a document required by the National Association of Securities Dealers. Assuming this were so, it would not preclude a finding that the card also is required by SEC regulations.

in compliance with securities laws, and that examiners depend on the accuracy of the cards (Pet. App. A7; II Tr. 43-48, 70-74).

Petitioner attempts to avoid this clear evidence by claiming that the expert testimony of the SEC official should not have been admitted and by claiming prejudice from the jury instruction on this issue. Petitioner's contention that the expert's testimony invaded the province of the jury is without legal foundation. Under Fed. R. Evid. 702 and 704 an expert may voice an opinion on an ultimate issue to be decided by the jury. See *United States* v. *Barrett*, 703 F.2d 1076, 1084 n.14 (9th Cir. 1983); *United States* v. *Grote*, 632 F.2d 387 (5th Cir. 1980), cert. denied, 454 U.S. 819 (1981) (testimony of IRS official concerning acceptability to IRS of defendant's tax return); *United States* v. *Taylor*, 562 F.2d 1345, 1358-1359 & n.8 (2d Cir.), cert. denied, 432 U.S. 909 (1977).

The jury instruction challenged by petitioner (Pet. 13) merely stated correctly that the J.A. Miller new account card contains the type of information required by 17 C.F.R. 240.17a-3(a)(9). The trial court did not instruct the jury that it was required to find that the new account card was, in fact, the specific record required to be kept under the SEC rule. The trial court instructed the jury fully on the element of specific intent (Instr. Nos. 9A, 27). The court of appeals properly concluded (Pet. App. A7-A8) that the instruction to which petitioner objects, read in the context of the entire charge to the jury, did not prejudice petitioner's right to a fair trial.

3. Petitioner contends further (Pet. 14-17) that his grand jury testimony should have been suppressed because he was not given *Miranda* warnings

or advised that he was a target. This Court rejected a similar argument in *United States* v. *Wong*, 431 U.S. 174 (1977), which held that failure to warn a grand jury witness of her Fifth Amendment privilege did not require suppression of her grand jury testimony in connection with her indictment for violation of 18 U.S.C. 1623, since the Fifth Amendment does not protect perjury. Of course, the fact that petitioner was under oath at the time he testified before the grand jury provided ample warning against testifying falsely. Moreover, although the trial court offered him the opportunity to do so (II Tr. 7-9), petitioner failed to make a record that would support his claim that the government told him at some point that he was not under investigation. In any event, since the list of individuals Brimberry implicated in the scheme did not include petitioner, it appears that petitioner was not a target at the time of his grand jury appearance.

4. Petitioner contends finally (Pet. 17-23) that the indictment should have been dismissed because the grand jury was improperly influenced by the testimony of the FBI case agent. This contention, too, lacks merit.

The court of appeals correctly held (Pet. App. A9) that there is no basis for petitioner's complaint that the agent's testimony had an improper influence on the grand jury. The agent merely summarized the testimony of other witnesses. It is clear that the grand jury could properly consider such testimony. See *Costello* v. *United States*, 350 U.S. 359 (1956); *United States* v. *Rossbach*, 701 F.2d 713, 716 (8th Cir. 1983). Moreover, the agent was not merely reciting hearsay from his investigation, but was recapitulating matters that had occurred before the

grand jury. Any grand juror was therefore free to rely on his own recollection of the summarized testimony. In these circumstances, it is clear that there was no improper influence on the grand jury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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